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**Economic Commission for Europe**

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

**Compliance Committee**

**Forty-fourth meeting**
Geneva, 25–28 March 2014
Item 7 of the provisional agenda
**Communications from members of the public**

# Findings and recommendations with regard to communication ACCC/C/2011/63 concerning compliance by Austria

**Adopted by the Compliance Committee on 27 September 2013**

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# I. Introduction

1. On 1 December 2011, the non-governmental organization (NGO) Vier Pfoten — Stiftung für Tierschcutz gemeinnützige Privatstiftung (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Austria had failed to comply with its obligations concerning the access to justice provisions of the Convention.[1]

2. Specifically, the communication alleges that the Party concerned fails to provide for access to justice for members of the public, including NGOs, in administrative penal and judicial criminal proceedings in respect of contraventions of national law relating to the environment. Therefore, according to the communication, the Party concerned is not in compliance with article 9, paragraphs 3 and 4, of the Convention.

3. At its thirty-fifth meeting (Geneva, 13–16 December 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 22 December 2012.

5. By letter of 10 January 2012, the Party concerned requested the Committee to reconsider the preliminary admissibility of the communication in the light of the Committee's findings on communication ACCC/C/2010/48 (Austria) (ECE/MP.PP/C.1/2012/4). By letter of 19 January 2012, the communicant expressed its views on that request of the Party concerned. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee took note of the letters from the Party concerned and the communicant and confirmed its decision on the communication's preliminary admissibility.

6. At its thirty-seventh meeting (Geneva, 26–29 June 2012), the Committee agreed to discuss the content of the communication at its thirty-eighth meeting (Geneva, 25–28 September 2012).

7. The Committee discussed the communication at its thirty-eighth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to both the communicant and the Party concerned and invited them to respond in writing after the meeting.

8. The Party concerned and the communicant submitted their response on 5 and 12 November 2012, respectively. In its response, the Party concerned included an overview of the steps taken and to be taken in view of the recommendations on communication ACCC/C/2010/48.

9. The Committee prepared draft findings at its forty-first meeting (Geneva, 25–28 June 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 18 July 2013. Both were invited to provide comments by 15 August 2013.

[1] Communication ACCC/C2011/63 and documents related to it, including responses from the communicant and the Party concerned, are available on the Committee's website from http://www.unece.org/env/pp/compliance/compliancecommittee/63tableat.html.

10. The Party concerned provided comments on 23 August 2013. The communicant acknowledged receipt of the draft findings on 24 July 2013 but did not provide substantive comments.

11. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-fourth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

# II. Summary of facts, evidence and issues[2]

## A. Legal framework

**Administrative penal proceedings — standing**

12. The Administrative Penal Act (*Verwaltungsstrafgesetz*) in conjunction with the Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) provide legal standing in administrative penal proceedings to persons who are involved in the matter on the basis of a legal title or interest (Administrative Procedure Act, art. 8), the accused (Administrative Penal Act, art. 32, para. 1), i.e., the private party, and the private prosecutor.

13. The possibility to participate as a private party depends on the applicable sectoral laws.

14. Administrative offences are prosecuted ex officio (Administrative Penal Act, art. 25) (*Offizialmaxime* — "principle of investigation ex officio") and in administrative penal proceedings, the competent authority has a dual function ("principle of inquisition"), as a prosecutor and a judge. In case of suspicion, the competent authority is obliged to initiate and conduct proceedings, and has a duty to determine the circumstances of the case.

**Judicial criminal proceedings — standing**

15. The Code of Criminal Procedure (*Strafprozessordnung*) defines the parties to criminal proceedings (art. 22), including the public prosecutor, the accused, the liable stakeholder, the private prosecutor, the subsidiary prosecutor and the private party. Most of them may appeal the procedure.

16. The objective of the mandatory prosecution principle in judicial criminal proceedings is to guarantee the equality of all persons and to ensure that no political or other discretionary criteria are used. NGOs have the possibility to report contraventions of environmental law to criminal investigation/public prosecution. Based on the circumstances, the evidence and the law, the prosecutor decides whether further prosecution is needed or whether the case should be closed. The principle of publicity (*Öffentlichkeitsgrundsatz*, Federal Constitution, art. 90, para. 1), applies to most of the judicial criminal proceedings, such as the hearings, but does not apply to the investigation stage.

17. The definition of the victim (Code of Criminal Procedure, art. 65, para. 1) encompasses victims that are or have been exposed to a particular emotional burden and victims that have suffered damage and seek redress. Victims are entitled to participate in

[2] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

the criminal proceedings: they can be informed about their procedural rights, heard during the trial and inspect the files, if relevant interests are affected.

18. Victims and persons that have a legal interest, as defined by law, have access to review procedures, including the possibility to request the continuation of a case that has been suspended (see Code of Criminal Procedure, art. 195 in conjunction with arts. 190–192).

19. When a victim makes a declaration of participation in the criminal proceedings, then it becomes a private party (*Privatbeteiligter*) and may receive compensation for damages. If there is no apparent legal interest, victims have to demonstrate the correlation between the criminal offence and damage. Private parties have the right to access documentary evidence from criminal investigation/public prosecution.

**NGO standing in criminal/penal proceedings**

20. Under some environmental laws, such as those concerning trade in wildlife or animal welfare, violations are pursued through penal administrative or criminal judicial proceedings only. There is no other avenue in administrative and civil proceedings.

21. Due to the exclusive definition of "parties" in penal administrative or judicial criminal proceedings, NGOs cannot participate in those proceedings following a violation of some environmental laws, and they are not recognized as private parties having a legal interest or as "victims" on behalf of nature, biodiversity or species, even if their objectives are related to the protection of the environment.

## B. Facts

22. One of the main activities of the communicant relates to campaigning for animal and endangered species protection. In doing so, the communicant reports contraventions of animal and species protection legislation by individuals to the competent administrative authorities or to the prosecution services, depending on the nature of the offence. The offences reported by the communicant have, among others, related to:

(a) Section 7 of the Wildlife Trade Act (*Artenhandelsgesetz*), which penalizes, among others, the import and export of wild species without the necessary licence;

(b) Sections 9 and 10 of the Vienna Nature Conservation Act (*Naturschutzegesetz*), which penalize several severe offences to habitats and species, such as being present in protected habitats without permission or collecting protected plants;

(c) Sections XIV to XVI of the Nature Conservation and Landscape Care Act of one of the Austrian provinces (*Burgenland Naturschutz- und Landschaftspflegegesetz*), which penalize acts that may jeopardize habitats and species, such as significantly removing waters and altering moorlands and wetlands environments and the surrounding area;

(d) The Animal Protection Act (*Tierschutzgesetz*), penalizing, for instance, acts that inflict pain, injury or other suffering to animals.

23. After reporting the alleged offences, the communicant has attempted to enquire with administration or prosecution, as appropriate, whether any action had been taken against the offenders.

24. Where administrative penal proceedings were brought, the communicant was not able, as a third party, to have access to the proceedings and related information, because the parties are the authority and the offender. In addition, the communicant did not have standing to challenge any action or omission of the public authority, after reporting the offence.

25. Similarly, for allegations giving rise to judicial criminal proceedings, the communicant attempted to participate in the proceedings as a private party but was never granted standing, on the grounds that it had not suffered damages eligible for compensation. As a consequence, the communicant was denied access to documentary evidence relating to the cases it had reported.

26. The communicant also attempted to participate in judicial criminal proceedings and to access the related documentation as a "victim" (Code of Criminal Procedure, art. 65, para. 1 (c)). It argued that a "victim" is not only the one who has suffered harm as a result of a criminal offence, but also anyone whose judicially protected interests could be impaired by that offence, and as an environmental organization devoted to animal and species protection its judicially protected interests were impaired by offences to species and animal protection. The communicant was never granted standing.

27. The communicant provides a specific example relating to reporting alleged contraventions of section 7 of the Wildlife Trade Act, i.e., the import of protected Egyptian vultures. On 2 February 2011, the communicant submitted a statement of facts to the Wiener Neustadt prosecution service and gave notice of its intention to join the proceedings as a private party, on the basis of the very high costs incurred upon it due to the frequent contraventions by the offender of the Animal Protection Act, the Wildlife Trade Act and the Criminal Code. On 8 June 2011, the communicant filed an application for inspection and transcription of documentary evidence. On 16 June 2011, the prosecution service rejected both the communicant's declaration to join the proceedings as a private party and its application to access documentary evidence. The rejection was based on the grounds that the communicant was not a victim in the meaning of article 65, paragraph 1 (c), of the Code of Criminal Procedure as it had not suffered damages eligible for compensation, and it did not have a legitimate interest as required in article 77, paragraph 1, of the Code. In the view of the prosecution service, the pursuit of the communicant's objective of animal protection did not represent a legitimate and recognized legal interest under the applicable law of the Party concerned.

28. The communicant appealed this decision of the prosecution service to the provincial (Wiener Neustadt) court. It argued that it was a victim as defined in the Code, since its interests in animal and environmental protection were legally protected by section 7 of the Wildlife Trade Act. Due to the purposes of its activities, as reflected in its by-laws, it was more directly concerned than any other member of the public and the alleged contraventions impaired its legally protected interests.

29. On 19 August 2012, the Wiener Neustadt Provincial Court dismissed the application, on the grounds that the communicant was not a victim under the Code, that it had suffered no damages eligible for compensation and that was not otherwise impaired in its judicially protected interests. The Court also found that the communicant did not have a legal interest required to access documentary evidence.

30. On 31 August 2012, the communicant appealed against that decision to the provincial court of appeal in Vienna. In its appeal, the communicant referred to the obligations arising from article 9, paragraph 3, of the Convention as well as to the findings of the Committee with regard to communication ACCC/C/2010/48. In this context, and for the purpose of proceedings concerning provisions of national law relating to the environment, the communicant noted that the definition of the victim under the Code of Criminal Procedure should be interpreted in a manner comprising environmental organizations.

31. The Vienna Provincial Court of Appeal dismissed the appeal by its decision of 10 October 2011,[3] and confirmed the ruling of the court of first instance. The Court of Appeal also noted that: (a) following the "mischief rule", the parliament had not intended the definition of victim under the Code to be interpreted broadly; (b) that international conventions, such as the Aarhus Convention, generally did not apply directly, but had to be transposed into national law to be binding on individuals; (c) that no transposition of the European Union (EU) directives relating to the Convention had occurred in the sphere of criminal law, including the law relating to judicial procedure, which meant that the Convention had no direct effect on the legal status of victims under the Code; and (d) that the Convention and the EU directives were very vague, leaving it to the discretion of the member States to implement them, and thus the definition of the "victim" under the Code remained unaffected.

32. There were no other possibilities for the communicant to challenge the violations, either by challenging the acts by persons or by challenging the omission of the competent authorities to pursue the violations.

## C. Domestic remedies and admissibility

33. To illustrate its allegations and also to show that domestic remedies were not available, the communicant provides the example of its attempts to join judicial criminal proceedings for reported contraventions of the Wildlife Trade Act. It also mentions that no further remedies are available.

34. In its response, the Party concerned questions the admissibility of the communication, first because of its relationship to communication ACCC/C/2010/48 and secondly because the communicant failed to use the existing domestic remedies.

35. The Party concerned recalls the Committee's findings on communication ACCC/C/2010/48, which covered standing for NGOs in environmental law with respect to permitting procedures, sectoral administrative procedures and civil law. It asserts that the aspects of administrative proceedings raised in the present communication were already covered by communication ACCC/C/2010/48, while the issue of participatory rights of NGOs and other members of the public in criminal or administrative penal proceedings is beyond the scope of rights granted under the Convention.

36. The Party concerned also notes that the communicant did not use the existing legal remedies provided under the environmental liability and environmental information laws.

37. The Party concerned first refers to the applicable EU law on environmental liability. According to article 2, paragraph 1 (a), of EU Directive 2004/35/CE on environmental liability (Environmental Liability Directive),[4] "environmental damage" means "damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species". The Directive further defines protected species and natural habitats (art. 2, para. 3) referring to the EU Birds and Habitats Directives.[5] Therefore, the Environmental Liability Directive covers matters on wild birds, natural habitats and wild fauna and flora. Provincial environmental liability acts, such as the Vienna and the Burgenland Environmental

[3] See annex 1 to the communication (translation of the decision provided by the communicant).

[4] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

[5] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (this is the codified version of Directive 79/409/EEC as amended); and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

Liability Acts have transposed EU law into the domestic legal order and NGOs may submit a request for action and also have access to a court of other independent and impartial public body, such as the Independent Administrative Senate (*Unabhängiger Verwaltungssenat*). The Party concerned also indicates that it is currently considering broadening the scope of applicability of the Environmental Liability Directive.

38. According to the Party concerned, the communicant could also have filed a request to obtain information on the "natural sites", the "biological diversity and its components" and the "measures or activities designed to protect these elements" under the Environmental Information Act.

## D. Substantive issues

39. The communicant alleges that it is completely impossible for NGOs and other members of the public to have access to justice in administrative penal and judicial criminal proceedings concerning contraventions of provisions of national law relating to the environment. The experience of the communicant reveals that in case of administrative penal proceedings, the communicant was not granted access to information relating to the offence it had reported (such as whether and how the competent authorities had followed up); and in case of judicial criminal proceedings, the communicant was neither granted access to related information on the offence it had reported, nor standing as a third party or even as a victim, although the purpose of its activity was closely related to the offence and its legal interest seemed to be evident. Therefore, the communicant alleges that the Party concerned fails to comply with article 9, paragraph 3, of the Convention.

40. The communicant also alleges that due to the complete absence of legal remedies for NGOs in administrative penal and judicial criminal proceedings, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

41. During the discussion before the Committee on 26 September 2012, the communicant also stressed that the Ombudsman for the Environment (Environmental Ombudsman) in Austria cannot be seen as a remedy, but as an administrative authority, which does not always have standing in review procedures; and also that environmental liability laws in Austria do not address cases of hunting, nature protection or other mistreatment of a single animal creature, but only address cases of severe negative effects on a species. In illustration of its allegations, the communicant informed the Committee of circumstances where animals were mistreated (killing frog populations near a pond, using a cheetah in a fashion show, using a fox for training hunting dogs) or other violations (dumping wastewater from a poultry farm near a Natura 2000 area), but members of the public that had reported the incidents could not verify whether the criminal offence had actually been prosecuted, and were not able to follow up, in the event the complaints had been dropped.

42. The Party concerned submits that it is not in breach of any of the Convention's provisions with respect to the present case. During the discussion before the Committee, the Party concerned admitted possible flaws in the present system, but noted that these are being addressed in the process of following up on the previous recommendations of the Committee, in the framework of the administrative court system of the country, at the federal and provincial levels.

43. Apart from its objections with regard to the admissibility of the communication (see above), the main argument of the Party concerned is that the access to justice provisions under the Convention do not extend to proceedings under criminal law and do not include matters of animal protection in a sense that goes beyond the protection of animals in their natural habitats (in situ) or animal welfare in the stricter sense (such as protection against animal torture). In the view of the Party concerned, there is no provision under the Convention asking Parties to grant specific participatory — or even prosecutorial — rights

to NGOs in criminal or administrative penal proceedings. In those proceedings, NGOs are heard in court or by the public prosecutors as witnesses, experts or private accuser. The main purpose of Austrian criminal and penal procedures is to implement the entitlement of the State under public penal law.

44. In particular, the Party concerned draws attention to the language used by the Convention. Article 9, paragraph 3, states that members of the public may "challenge", not "penalize". Article 9, paragraph 4, refers to the procedures in the three previous paragraphs. Article 9, paragraph 1, concerns requests for information. With regard to this aspect the Environmental Information Acts (*Umweltinformationsgesetze*) at the federal and provincial levels reflect the obligations of this provision. Article 9, paragraph 2, concerns access to justice for permitting activities under article 6; however, neither article 6 nor any other provision of the Convention explicitly refers to criminal or administrative penal proceedings.

45. The Party concerned argues that some of the legislation referred to by the communicant, namely, the Animal Protection Act and the Wildlife Trade Act, is not covered by the Convention. It notes that the definition of "environmental information" in article 2, paragraph 3, of the Convention indicates that the the term "environment" includes the natural, cultural and built environment, and may subsume animal protection in broader terms, especially as species conservation, biological diversity and conservation of flora, fauna and habitats; but the term does not cover animal protection in the stricter sense, such as domestic animals, or the trade of endangered species. In this sense, the communicant's allegations (including the examples of using a cheetah in a fashion show or a fox to train hunting dogs) fall outside the scope of the Convention.

46. The Party concerned reiterates that access to justice under the Aarhus Convention does not extend to proceedings under criminal law, and takes the position that animal protection under the Convention includes only their protection in their natural habitats in Austria. It maintains that, apart from the possibilities offered under the EU Environmental Liability Directive, as transposed into national law, members of the public have the possibility to have access to justice by using civil law remedies and the institution of the Environmental Ombudsman. Nevertheless, the Party concerned admits that the existing situation is not satisfactory and considers that those changes it intends to make, as a follow-up to the Committee's recommendations in ACCC/C/2010/48, will extend the legal standing of NGOs so as to respond to the issues raised by the communication.

## III. Consideration and evaluation by the Committee

47. Austria ratified the Aarhus Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.

48. The central allegation of the communication is the lack of possibility for members of the public, including NGOs, to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of the national law relating to the environment, under article 9, paragraph 3, of the Convention. The Committee decides not to consider alleged non-compliance with article 9, paragraph 4, of the Convention on the merits, because in the present case the allegations of the absence of effective remedies (art. 9, para. 4) are subsumed by the allegations of a complete absence of any remedies (art.9, para. 3). That is, if the Committee holds that the Party concerned fails to provide any remedy, as provided for under article 9, paragraph 3, this also implies a failure by the Party concerned to comply with article 9, paragraph 4.

49. With respect to the connection of the communication to communication ACCC/C/2010/48, in which standing was considered in the context of the remedies

available both under permitting participatory procedures (art. 9, para. 2) and administrative and civil remedies for contraventions of national law relating to the environment, in particular in sectoral and provincial laws, the Committee notes that the present communication goes beyond the scope of ACCC/C/2010/48, because it calls for consideration of the Committee of access to penal/criminal proceedings in environmental matters.

50. The first question to be addressed is whether the laws invoked by the communicant constitute "national law relating to the environment"; the second is whether members of the public, including NGOs, have any possibility to exercise their rights under the Convention in cases where the contravention of environmental legislation triggers the application of judicial criminal or administrative penal proceedings.

51. Before examining these aspects more thoroughly, the Committee recalls that "the criteria, if any, laid down in national law" in accordance with article 9, paragraph 3, should not be seen as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national laws relating to the environment (see findings on communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C/1/2006/4/Add.2, paras. 35–37) and ACCC/C/2006/18 (Denmark) (ECE/MP.PP/C/1/2008/5/Add.4, paras. 29–31)).

**National law relating to the environment (art. 9, para. 3)**

52. Article 9, paragraph 3, is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene laws relating to the environment, and with the means to have existing laws relating to the environment enforced and made effective (see also findings on ACCC/C/2005/11 (Belgium), para. 34). Importantly, the text of the Convention does not refer to "environmental laws", but to "laws relating to the environment". Article 9, paragraph 3, is not limited to "environmental laws", e.g., laws that explicitly include the term "environment" in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment.

53. The scope of "national laws" also extends to the applicable EU law in a member State. In this regard, acts and omissions that may contravene EU regulations or directives, but not national laws implementing those instruments, may as well be challenged under paragraph 3 (see findings on ACCC/C/2006/18 (Denmark), para. 27).

54. The broad understanding of "environment" under the Convention is drawn from the broad definition of "environmental information" under article 2, paragraph 3, which also extends to "biodiversity and its components, including genetically modified organisms". The fact that components of biodiversity have been removed from their habitat does not necessarily mean that they lose their property as biodiversity components.

55. Laws on the protection of wildlife species and/or trade in endangered species (including marketing in the domestic market, import and export) are also "laws relating to the environment", because they are not limited to the regulation of trade relations but include obligations on how the animals/species are to be treated and protected. Accordingly, these laws help protect or otherwise impact on the environment. In addition, to the extent the laws of the Parties relating to the environment apply to acts and omissions of a transboundary or extraterritorial character or effect, these acts and omissions are also subject to article 9, paragraph 3, of the Convention.

**Access to administrative or judicial proceedings and effective remedies (art. 9, paras. 3 and 4)**

56. In its findings on communication ACCC/C/2006/18 (Denmark) the Committee noted that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, as long as there were other means for challenging those acts and omissions. In the present case, the Committee therefore looks also at whether the system of the Party concerned provides for any other means for challenging acts and omissions by private persons and public authorities that contravene provisions of its national law relating to the environment.

57. The Party concerned specifically referred to the remedies available to the communicant under the environmental liability and environmental information laws. The Committee notes that the scope of applicability of these laws does not cover all aspects referred to in the present communication. For instance, under environmental liability laws action may be triggered by environmental organizations for alleged damage (as measurable adverse change) to protected species and natural habitats or alleged significant damage to water and land. As already mentioned in the previous section, the scope of the "environment" under the Convention is to be understood as going beyond these aspects of environmental effects. The Party concerned seems to be aware of the inconsistencies in its system and mentioned during the discussion the possibility of amendments to the environmental liability laws to address also the situations subject to the present communication.

58. The Austrian Environmental Liability Act, adopted by the Party concerned in the implementation of the EU Environmental Liability Directive, allows NGOs to file complaints and acquire legal standing in civil procedures only if there is a specific environmental damage. Even in such cases, NGOs have legal standing only in proceedings concerning precautionary measures and compensation for environmental damages that have already occurred.

59. Under the law of the Party concerned, at the national and/or provincial level, certain acts and/or omissions that may impact on the environment can be challenged through penal administrative or criminal judicial proceedings. Members of the public, including environmental NGOs, cannot participate in these proceedings, but at the same time, the communicant claims that they have no other means to challenge such acts or omissions of public authorities or private persons in contravention to national laws on environment, as is required under article 9, paragraph 3, of the Convention.

60. Moreover, members of the public, including NGOs, may not invoke their rights under the Austrian Environmental Liability Act in the context of penal/criminal procedures or as effective remedies to challenge acts and omissions contravening provisions of the laws of the Party concerned relating to the environment.

61. The Party concerned refers to the use of the institution of the Environmental Ombudsman. The Committee has already reviewed the function of the Ombudsman for the Environment under the law of the Party concerned (findings on communication ACCC/C/2010/48 (Austria), para. 74) and found that not only may its authority be limited, as it does not have standing in the procedures of many sectoral laws relating to the environment, but it has discretion whether or not to bring a case to court, despite the request of a member of the public, including an NGO. The Party concerned points to proposals for changes to the institution currently under discussion. It also mentions that Environmental Ombudsmen of some provinces have agreed to act when requested by members of the public, even if they are not obliged by law to do so. Given the limited role of the institution of the Ombudsman, the Committee does not consider the possibility of bringing complaints to the Ombudsman as providing a means for challenging acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment, as required by article 9, paragraph 3, of the Convention.

62. On the basis of the information received from the Party concerned on how it intends to address the Committee's recommendations on communication ACCC/C/2010/48, the Committee considers it too early to assess whether the discussed amendments to the Environmental Liability Act, the institution of the Environmental Ombudsman or to other laws will effectively address some or all the issues raised in the present communication. The Party concerned has proceeded with interministerial meetings, but no advance draft laws, for instance, have been tabled that could be considered by the Committee as per the Party's potential compliance with the Convention.

63. The Committee concludes that in certain cases members of the public, including environmental NGOs, have no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national law, including administrative penal law and criminal law, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection. Whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention. For these reasons, the Committee holds that the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention.

64. The Committee does not exclude the possibility that in addressing the recommendations in ACCC/C/2010/48 the Party concerned will also address the issues identified in the present communication. In this respect, the Committee reminds the Party concerned that in proceeding with any amendments it should take into account that access to justice under article 9, paragraphs 3 and 4, requires more than a right of members of the public to address an administrative authority or the prosecution about an illegal activity. Members of the public should also have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities when they consider that such acts or omissions amount to criminal acts or administrative offences. This may be pursued through avenues within or beyond penal/criminal law procedures.

# IV. Conclusions and recommendations

## A. Main findings with regard to non-compliance

65. The Committee finds that, because members of the public, including environmental NGOs, have in certain cases no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention (see para.63 above).

## B. Recommendations

66. Pursuant to paragraphs 35 and 37 (b) of the annex to decision I/7, the Committee recommends that the Meeting of the Parties recommend to the Party concerned, that, when addressing the recommendations under ACCC/C/2010/48, it also ensure that members of the public, including NGOs, have access to adequate and effective administrative or judicial procedures and remedies in order to challenge acts and omissions of private persons and public authorities that contravene national laws, including administrative penal laws and criminal laws, relating to the environment.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

**Compliance Committee**

**Forty-fourth meeting**
Geneva, 25–28 March 2014
Item 7 of the provisional agenda
**Communications from members of the public**

# Findings and recommendations with regard to communication ACCC/C/2012/66 concerning compliance by Croatia

**Adopted by the Compliance Committee on 27 September 2013**

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# I. Introduction

1. On 24 January 2012, the non-governmental organization (NGO) Association for Nature, Environment and Sustainable Development "Sunce" (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Croatia had failed to comply with its obligations under the Convention concerning public participation with regard to plans and programmes.[1]

2. Specifically, the communication alleges that the Party concerned failed to comply with article 7 of the Convention because of the adoption of waste management plans at the county and city level without inspection control and public participation, as required under the Croatian Environmental Protection Act (EPA) and further regulated by special laws.

3. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 8 May 2012. On the same date, a letter was sent to the communicant. Both were asked to address a number of questions from the Committee.

5. The communicant and the Party concerned responded to the Committee's questions on 4 October and 8 October 2012, respectively. The communicant submitted additional information on 22 November 2012.

6. At its thirty-eighth meeting (Geneva, 25–28 September 2012), the Committee agreed to discuss the content of the communication at its thirty-ninth meeting (Geneva, 11–14 December 2012).

7. The Committee discussed the communication at its thirty-ninth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee posed a number of questions to both the communicant and the Party concerned and invited them to respond in writing after the meeting.

8. The communicant and the Party concerned submitted their response on 10 and 15 February 2013, respectively.

9. The Committee prepared draft findings at its forty-first meeting (Geneva, 25–28 June 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 18 July 2013. Both were invited to provide comments by 15 August 2013.

10. The communicant and the Party concerned provided comments on 12 August and 2 September 2013, respectively.

11. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee finalized its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal

[1] Communication ACCC/C/2012/66 and documents related to it, including responses from the communicant and the Party concerned, are available on the Committee's website from http://www.unece.org/env/pp/compliance/compliancecommittee/66tablecroatia.html.

pre-session document to its forty-fourth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

# II. Summary of facts, evidence and issues[2]

## A. Legal framework

12. According to the Croatian EPA, the public has the right to participate in plans and programmes (art. 16, para. 3). The EPA further requires that the public be informed of their rights to participate in procedures, including the right to present their opinion on proposals for plans and programmes related to the environment which are not subject to mandatory strategic assessment (arts. 140 and 142).

13. The Regulation on Information and Participation of the Public and Public Concerned in Environmental Matters provides the details for carrying out public participation procedures. For plans and programmes relating to the environment, but which are not subject to strategic environmental assessment (SEA), the competent authority has to publish the information about the proposal on its website (art. 3). The public affected by the implementation of the proposed plans and programmes have the rights to submit their views, objections and proposals (arts. 14 and 15).

14. In addition to the above two instruments, the Convention is implemented by the Regulation on Strategic Environmental Assessment of Plans and Programmes.

15. The Waste Act regulates the adoption of waste management plans at the national, county and municipality/town levels (see art. 7). The Waste Management Strategy, as part of the Sustainable Development Strategy, defines waste policy at the national level. The National Waste Management Plan is the technical document that implements the policy of the Strategy. Both the Waste Management Strategy and the National Waste Management Plan are adopted by parliament.

16. County waste management plans are adopted at the county level (including Zagreb), and town/municipality plans are adopted by the local Council. These plans must follow the Waste Management Strategy and the National Waste Management Plan, and their implementation is supervised by the competent authority. They regulate matters on the separation and collection of waste, management of landfills, waste-polluted locations and dump sites and remedial action. Reports on the implementation of the plans are also adopted by the town/municipal council and submitted to the Ministry of Environmental Protection, Physical Planning and Construction (Ministry of Environmental Protection) and the Croatian Environmental Protection Agency. The Agency prepares a synthesis report that is available to the public.

17. Town/municipality waste management plans "heavily lean"3 on town/municipality spatial plans, for which public consultation is obligatory, and may include consultation with private sector stakeholders.

[2] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

[3] See response by the Party concerned of 8 October 2012, para. 16.

## B. Facts

18. On 30 March 2011, on the occasion of the preparation of the second national implementation report under the Convention, the communicant sent a letter to the Ministry of Environmental Protection complaining about the lack of inspection control and public participation in the adoption of several waste management plans in the country (see annex to the communicant's response of 4 October 2012), specifically in Split-Dalmatia County.[4] According to the communicant, this was due to the incorrect interpretation of Croatian legislation. The plans in question were adopted after the Convention had entered into force for the Party concerned.

19. By letter of 27 April 2011 (annex 1 to the communication), the Ministry responded that strategies, plans and programmes are documents of sustainable development and environmental protection only when the EPA or sectoral legislation explicitly determines them as such; and that, unlike waste management strategies, waste management plans are not mentioned in either the EPA or sectoral legislation as sustainable development and environmental protection documents. Therefore the provisions for inspection control and public participation do not apply. Waste management plans, at county, municipality or town level, simply implement the Waste Management Strategy.

20. During the discussion before the Committee at its thirty-ninth meeting, both parties confirmed that a public participation procedure had taken place according to the Convention for the adoption of the Waste Management Strategy.

## C. Domestic remedies and admissibility

21. The communicant states that the websites of the two major cities in Split-Dalmatia County, Split and Kastela, included information on the adoption of the plans, but that the public was not involved in the process. The communicant submitted letters of complaint to the City of Split, the City of Kastela and the Ministry of Environmental Protection. As a result of the communicant's action, the public was apparently involved in the adoption of the Split and Kastela waste management plans.

22. However, the communicant submits that, for the other plans, the public was not duly informed about their adoption or the process of adoption. As a result, the communicant missed the deadlines set by national law to challenge the plans before domestic courts.

## D. Substantive issues

23. The communicant alleges that by adopting several waste management plans without carrying out inspection control and public participation procedures, the Party concerned failed to comply with article 7 of the Convention.

24. In the view of the communicant, the provisions for public participation included in the EPA, a framework law of general application, should apply to all special laws, including the Waste Act, as long as special laws do not explicitly exclude the application of the Environmental Protection Act's general provisions. Since the Waste Act does not specifically exclude the application of public participation procedures under the EPA, waste management plans should be adopted following public participation procedures. The fact that the EPA does not specifically refer to "waste management plans" is irrelevant, because

[4] The communicant refers to Hvar, Sinj, Stari, Grad, Vis, Rgorac, Marina, Otok, Postira, Sucuraj, Zagvozd, etc.

waste management plans concern the management, recovery and recycling of waste and thus constitute an essential element of sustainable development and resources management.

25. The communicant also stresses that the fact that public consultations for the adoption of the Split and Kastela waste management plans eventually took place, after the communicant had sent complaints to the local authorities and the Ministry, demonstrates that according to the law of the Party concerned, public participation should be provided for the adoption of town/municipality waste management plans, but the provisions of the law are not clear on this subject.

26. The Party concerned in general submits that there is no non-compliance with the Convention, and that the communicant's complaint is manifestly unfounded.

27. The Party concerned points out that by being labelled as "plans" waste management plans do not immediately fall within the scope of article 7 of the Convention. They operationalize and implement the policy contained in the Waste Management Strategy, as part of the Sustainable Development Strategy and the State and county waste management plans, the latter of which are subject to public participation in the context of strategic assessment. Therefore, there is no obligation for early public participation under article 6, paragraph 4, of the Convention.

28. The Party concerned further explains that the elements of waste management plans at the municipal/town level (i.e., the separation and collection of waste, the management of landfills, waste-polluted locations and dump sites and remedial action) are not as such referred to in article 6, paragraph 6, of the Convention. Thus, these plans are not programmes or policies and they do not include any information related to the description of sites, significant impacts on the environment and possible emissions or alternatives, or locations for new waste management facilities or sites for new landfills.

## III. Consideration and evaluation by the Committee

29. Croatia ratified the Convention on 27 March 2007. The Convention entered into force for Croatia on 25 June 2007.

30. Waste management planning in Croatia is decided at three government levels (see art. 7 of the Waste Act, para. 15 above): at the national level (Waste Management Strategy and National Waste Management Plan); at the county (regional) level (county management plan); and at the local (town/municipality) level (municipality/city/town management plan). County plans should be in line with the framework described in the national strategy, and municipality plans should be in line with the provisions of the county plans. In addition, waste producers are also obliged to prepare waste management plans.

31. There is no issue of flawed public participation in the process of adopting the waste management planning documentation at the national level. During the discussion at the Committee's thirty-ninth session, the Party concerned and the communicant agreed that the law of the Party concerned requires the carrying out of public participation for the adoption of such a plan, and the communicant confirmed that when the public participation procedure was provided for adoption of the Waste Management Strategy, members of the public, including the communicant, were able to participate.

32. Both parties agree that there is an obligation of the authorities to carry out public participation for the preparation of county management plans. Apart from the case of Split-Dalmatia County, no other examples were provided to the Committee to demonstrate a persistent pattern in the authorities' practice demonstrating non-compliance with the public participation requirements prescribed by law.

33. For these reasons the Committee does not examine whether the law and practice of the Party concerned is in compliance with the Convention in the case of the preparation of the national Waste Management Strategy and the county management plans. The Committee thus focuses on the law and practice of the Party concerned with regard to the adoption of municipal waste management plans.

**Waste management plans as plans relating to the environment (art. 7)**

34. According to the communicant municipal waste management plans fall within article 7, but according to the Party concerned these plans are only technical documents implementing the decisions taken under the national and county management plans, which were prepared following public participation procedures. Yet, both parties agree that waste management plans are documents relating to the environment.

35. What constitutes a "plan" is not defined in the Convention. The fact that a document bears in its title the word "plan" does not necessarily mean that it is a plan; rather it is necessary to consider the substance of the document (see also findings on communication ACCC/C/2008/27 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.2, para. 41)). The Committee thus considers the contents of the municipal waste plans of the Party concerned, as well as the legal effects of these plans on the public, to determine whether they fall within the ambit of article 7 and the extent to which public participation procedures should apply under the Convention.

36. According to the Waste Act (art. 11), the municipality waste plan contains: (a) measures for separate collection of municipal waste (such as the locations for the containers for special waste or the contractual relationship between the company dealing with a special waste category at the national or regional level and the company handling waste at the local/municipality level); (b) measures for the management and supervision of municipal waste landfills (such as the timetable of opening and closing hours for landfills); (c) a list of waste-polluted locations and dump sites; and (d) a programme of action and financial provisions for the remediation for the sites mentioned in section (c).

37. The Committee notes that the municipality waste management plan may implement at the local level what was already decided in the national/regional waste management documentation. For instance, if the national waste management plans contain the general technical requirements for waste management facilities (Waste Act, art. 9, para. (2) 4), the county waste management plan provides for the construction planning of such facilities (Waste Act, art. 10, para. (1) 4) according to the technical requirements in the national plan, and the municipal waste management plan requires the local waste operator to transfer and store the waste to one of the facilities listed in the county plan (Waste Act, art. 11, para. (1) 1). Similarly, where the national plan sets the general requirements for the management of special waste categories (Waste Act, art. 9, para. (2) 2), the county plan defines measures for separation of waste in the county (Waste Act, art. 10, para. (1) 3), and the municipality lists the specific locations of the containers (Waste Act, art. 11, para. (1) 1).

38. Thus, the municipality waste management plan does not simply copy the decisions contained in the national/regional waste management plans and the spatial management plans (where there is provision for the landfill sites, for instance); rather, in order to implement the general framework of waste management set at the national/regional level, it makes specific provisions and includes details for waste management at the local level. This is further demonstrated by the contents of the plans of Ivanska and Cres,[5] which

[5] Submitted by the Party concerned on 15 February 2013.

provide for measures for the treatment of specific waste (medical waste, construction waste, etc.) or for the landfill.[6] Besides, there would be no reason for municipal waste management plans to exist if all the details had already been well established in the national and regional management plans, as well as in the spatial management plans.

39. While these municipality waste management plans implement the national and county waste management plan and the national strategy at the local level, they are not only theoretical orientations on waste management or only a repetition of the subjects treated in the national/county waste management documentation. It is apparent to the Committee that they contain considerations specific to the region concerned on the impact of waste management, on possible emissions, possible locations and facilities, which are without doubt of interest to the public and therefore should be subject to public participation according to article 7. Moreover, whether a document sets the framework for future development consent is not a determining factor of its nature as a plan under article 7 or not.

40. The fact that the waste management plans are not mentioned in the EPA and in sectoral laws as sustainable development and environment protection documents is not relevant; an insufficient coverage by the legislation of one of the subject matters of the Aarhus Convention cannot be invoked as an excuse to avoid its application to an activity which is obviously related to the protection of the environment.

41. For these reasons, the Committee finds that municipal waste management plans are plans within the purview of article 7 of the Convention.

**Public participation in the preparation of waste management plans**

42. In order to evaluate whether the Party concerned is in compliance with the Convention, the Committee examines both the regulatory framework and the established practice for the preparation of municipal waste management plans, which may already meet the minimum standards for public participation set by article 7.

43. As set out in article 7, the Party concerned has to make the appropriate practical and/or other provisions for the public to participate during the preparation of the plan and in accordance with three specific provisions of article 6, paragraphs 3, 4 and 8, of the Convention. This has to be done "within a transparent and fair framework, having provided the necessary information to the public", while specific reference is made to the objectives of the Convention.

44. In its article 16, paragraph 3, the Croatian EPA lays down the general right of the public to participate in procedures, inter alia, for the development and adoption of plans. For some plans, public participation procedures under SEA apply; for other plans, the procedures set out in EPA section IX apply, in particular EPA article 142, as well as article 14 of the Regulation on Information and Participation of the Public and the Public Concerned in Environmental Matters (Regulation on Information and Public Participation), which provides the details for carrying out public participation procedures. Since no SEA is required for waste management plans, the second set of provisions for public participation are relevant.

45. EPA article 142 provides for the right of the public to present its opinions, comments and proposals on drafts of plans and programmes related to the environment. The same article also sets out the obligation of the public authorities to ensure timely and efficient public participation in the process of drafting and amending plans within their

[6] The communicant also provided contents of the Split management plan on 11 February 2013.

competence. Article 140 requires proper dissemination of information in the early phase of the procedure, when all options are open, elaborates on the content of the public notice, sets a minimum deadline of 30 days and obliges the competent authority to review the results of public participation and inform the public of its decision.

46. The EPA also provides that the list of the plans requiring public participation, as well as the identification of the public which may participate, should be established by way of a regulation (art. 142, paras. 3 and 4).

47. The Regulation on Information and Public Participation (arts. 3, 4 and 14) adds elements for public participation in the preparation of plans, in particular with regard to the obligation of the competent authority to inform the public through its website and the content of the public notice. Like the EPA, the Regulation does not define the plans for which this procedure applies, and mentions that these would be determined by law. It identifies the public which may participate as "the public which may be affected by those plans [...] during their implementation".

48. On the basis of the above, the Committee finds that the Party concerned has made regulatory arrangements for the public to participate during the preparation of plans relating to the environment. More specifically, the Committee understands that the requirements of article 6, paragraphs 3, 4 and 8, incorporated in article 7, of the Convention, are implemented through EPA articles 140 and 142, and the requirement of providing the necessary information to the public is implemented in particular through the Regulation on Information and Public Participation (arts. 3, 4 and 14).

49. However, the Committee notes that the EPA (art. 142, para. 3), as well as the Regulation on Information and Public Participation (art. 14, para. 3), stipulate that the list of plans relating to the environment which are not subjected to SEA, but for which public participation is required, will be determined by law/regulation. According to the information submitted to the Committee, there is yet no law/regulation in place as to this type of plans, and this creates uncertainty as to the application of the public participation procedures.

50. In addition, according to the English translation of the laws provided to the Committee, there is no consistency as to whether the public participates before the first draft of the plan or only once there is a draft available (see text of the EPA (art. 142, para. 2), and the Regulation on Information and Public Participation (art. 14, para. 1), referring to the "draft proposal of the plans", as compared with the general principle for public participation in the development of plans enshrined in the EPA (art. 16, para. 3)).

51. For these reasons, the Committee finds that the present arrangements under the law of the Party concerned are not sufficiently clear to ensure that the requirement of article 7 for a transparent framework is met. Thus, the Party concerned fails to comply with article 7.

52. To illustrate its allegations, the communicant referred to the examples of the preparation of the Split and Castela municipality waste management plans, in which in two cases public participation was carried out, further to the communicant's request. Apart from these two cases, the Committee was not provided with sufficient information to assess whether there is a consistent practice as to the conduct of public participation for the preparation of other municipality waste management plans. On the basis of the information provided, and given that the Split and Castela municipality waste management plans were isolated cases, since public participation was provided at the communicant's request, the Committee is not in a position to conclude whether there is a persistent practice by the authorities of the Party concerned not to make the appropriate practical and/or other provisions during the preparation of the municipality waste management plans. However, the fact that the framework is not clear and transparent (see above) suggests that there is uncertainty in practice on whether public participation should be provided. The Committee

also emphasizes that article 7 obliges public authorities to organize public participation procedures, as required by law; hence, it should not be for the public to remind the authorities of their right to participate.

**Clear and transparent framework (art. 3, para. 1)**

53. Based on the considerations above, the Committee finds that the legislation in force in the Party concerned fails to provide for a consistent and uniform application throughout the territory and is not clear as regards public participation in the preparation of municipality waste management plans, and therefore is not in compliance with article 3, paragraph 1, of the Convention.

# IV. Conclusions and recommendations

54. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

## A. Main findings with regard to non-compliance

55. The Committee finds that:

(a) The present arrangements under the law of the Party concerned are not sufficiently clear to ensure that the requirement of article 7 for a transparent framework is met. Thus, the Party concerned fails to comply with article 7 of the Convention (para. 51);

(b) The Committee finds that the legislation in force in the Party concerned fails to provide for a consistent and uniform application throughout the territory and is not clear as regards public participation in the preparation of municipality waste management plans, and therefore is not in compliance with article 3, paragraph 1, of the Convention (para. 53).

## B. Recommendations

56. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties to the Convention, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends to the Party concerned that it ensure that a transparent framework is in place providing for appropriate practical and/or other provisions for the public to participate during the preparation of municipality waste management plans, by, inter alia, including municipality waste management plans in the list of plans relating to the environment which are not formally subjected to SEA, but for which public participation is required, so that article 7 of the Convention is clearly applicable to such plans.